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Public Prosecutor v Arumugam a/l Dorasamy

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HIGH COURT (PENANG) — CRIMINAL APPLICATION NO PA-44–17–06 OF 2021
MOHD RADZI ABDUL HAMID JC
1 SEPTEMBER 2021

C

Criminal Procedure — Trial — Gag order — Respondent social activist and spokesman for victim's family in murder trial posted regular comments on Facebook criticising shoddy police investigations and shortcomings in prosecution's conduct of trial — Respondent alleged defects in investigations and prosecution and manipulations in evidence of certain material witnesses showed attempt to cover-up truth and protect certain persons from being held responsible for victim's murder — Whether respondent's publications could potentially cause material witnesses to refuse to testify out of fear or for other reasons — Whether publications could affect accused's right to have a fair trial and prosecution's right to conduct trial without fear, undue pressure of public condemnation, suspicions of malicious misconduct or risk of any of its witnesses becoming absent, un-cooperative or fearful — Whether situation warranted respondent to be 'gagged' until trial was concluded

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The applicant ('PP') applied for a gag order against the respondent ('R') to prevent him from making public comments on an on-going trial of four persons jointly charged with murdering a teenager ('Nhaveen'). Claiming to be a social activist and influencer and a spokesman for Nhaveen's family, R had posted various comments ('publications') on his Facebook page criticising deficiencies in police investigations into the case, shortcomings in the way the prosecution was being conducted and refuting the testimonies of certain prosecution witnesses, especially the findings of the doctor who performed the post mortem on the victim's body. R alleged that the prosecution's case (which was on-going) was marred by untruths and manipulation of evidence to allow certain individuals to escape responsibility for Nhaveen's murder. R's publications had generated much public discussion over the murder case and the trial on his Facebook page. The PP submitted that R's publications had 'hijacked' the prosecution's conduct of the trial and had caused public loss of confidence in the prosecution. For instance, the PP said that a crucial prosecution witness, Previn, who was with the victim at the material time, never turned up in court to testify despite the prosecution's several attempts to contact him. The PP also submitted that the prosecution was not in a position to publicly rebut accusations and insinuations made against it by R and the gag order was therefore necessary to allow the prosecution to conduct its case without outside pressure or interference. In resisting the PP's application, R submitted that he was acting bona fide to highlight various shortcomings in the

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police investigations in the case and the manner in which the prosecution was being conducted in order to ensure that those responsible for Nhaveen's murder were brought to justice.

Held, allowing the PP's application:

(1) The court granted a gag order against R on the following terms: 'Bahawa Responden dan/atau ejennya yang mempunyai kaitan secara langsung dan/atau tidak langsung dengan Responden diperintah dan ditegah sementara menunggu pelupusan muktamad perbicaraan kes PA-45B-1–02/2018 untuk tidak menerbitkan dan/atau menyebabkan penerbitan dalam media massa atau membuat siaran dan/atau apa jenis komunikasi dalam apa jua bentuk yang ditujukan kepada khalayak ramai dan/atau mana-mana pihak tertentu sebarang kata-kata, komen, perbincangan-perbincangan dan/atau kenyataan-kenyataan termasuk rujukan kepada sebarang komunikasi secara bertulis dan/atau tidak bertulis dengan pihak Pendakwaan dan/atau Polis Diraja Malaysia yang mana kata-kata yang digunakan oleh Responden dan/atau ejennya secara langsung atau tidak langsung yang boleh membawa maksud atau kesan, sama ada disengajakan atau tidak dan/atau diniatkan atau tidak, bahawa perbicaraan kes PA-45B-1–02/2018 dicemari oleh salah laku atau kecuaian atau kegagalan yang disengajakan oleh pihak Polis, Pendakwaan, saksi-saksi perbicaraan dan terkait dengan itu timbulnya spekulasi, tuduhan, tohmahan atau syak wasangka bahawa akan atau sedang berlaku satu perbuatan khianat, niat jahat, komplot atau salah laku untuk tidak melakukan siasatan, pendakwaan, penyampaian keterangan saksi dan pengendalian perbicaraan kes PA-45B-1–02/2018 secara benar, telus dan saksama mengikut kehendak undang-undang dalam pentadbiran keadilan. Kegagalan mematuhi Perintah akan menjadi satu penghinaan terhadap Mahkamah yang mulia ini' (see para 57).

(2) The court agreed with the PP that R's publications posed a real and immediate risk or threat of prejudice to the fair trial of the accused persons and the administration of justice in the on-going trial. The risks that the prosecution would face in the conduct of the trial vis a vis the conduct of its witnesses and aspersions of malicious conduct by the prosecution could not be compensated by any other remedy. An order to gag R was therefore proportionate to the preservation of the prosecution's right to conduct the trial without fear, undue pressure of public condemnation, suspicions of malicious misconduct or the risk of any of its witnesses becoming absent, uncooperative or fearful. On equal footing, it was also proportionate to the right of the accused persons to a fair trial and the presumption of innocence until proven guilty (see paras 40 & 53).

(3) The court agreed with the PP that R's publications posed a real and immediate risk or threat of prejudice to the fair trial of the accused persons and the administration of justice in the on-going trial. The risks that the prosecution would face in the conduct of the trial vis a vis the conduct of its witnesses and aspersions of malicious conduct by the prosecution could not be compensated by any other remedy. An order to gag R was therefore proportionate to the preservation of the prosecution's right to conduct the trial without fear, undue pressure of public condemnation, suspicions of malicious misconduct or the risk of any of its witnesses becoming absent, uncooperative or fearful. On equal footing, it was also proportionate to the right of the accused persons to a fair trial and the presumption of innocence until proven guilty (see paras 40 & 53).

(4) The prosecution could not enter into the arena of public debate to comment on its conduct of the trial and its direction while the trial was on-going as any such comments might prejudice the accused persons who were presumed innocent until proven otherwise. The prosecution could only respond to any allegation of misdeed by remaining steadfast and continuing to conduct its trial with honesty and integrity to the best of its ability and leave it to the trial judge to decide at the end of the trial based on an evaluation of all the evidence (see paras 51–52).

(5) The court found that R's publications were not an objective and factual reporting or bona fide discussion of the on-going trial. Rather, they were riddled with speculation, accusations and insinuations of a conspiracy to subvert the administration of justice through manipulation of evidence by witnesses, willful incomplete investigations, abandonment of duties by officers of the police and prosecution and a cover-up to protect certain persons from being found responsible for Nhaveen's death. Even if R had basis for complaint against the police or prosecution, he should have sought redress through the proper channels instead of going on a public crusade to make accusations of malicious conduct against the prosecution and its witnesses when the trial was still on-going. The prosecution's work was yet to be completed and the full narrative of its case was still unfolding. R's comments and condemnations were clearly premature and pre-judgmental and tainted the image and credibility of the prosecution and its witnesses and threatened to interfere with the administration of justice (see paras 33–35 & 43).

(6) R's actions amounted to *sub judice* in relation to the on-going trial. It was not too unlikely to anticipate that witnesses who had yet to testify might, in the light of the scathing remarks made by R, possibly refuse to testify or might become un-cooperative or forgetful thereby making it difficult for the prosecution to elicit material evidence to assist the court in coming to the truth of the matter under trial. There was a risk that future

witnesses might colour their evidence, to the prejudice of the prosecution's case or the accused persons, out of fear that they might be ostracised in public for something they had, or had not, said in evidence. Already, a crucial prosecution witness, Previn, failed to appear to testify without any explanation despite multiple attempts by the prosecution to reach him (see paras 37–39 & 44).

[Bahasa Malaysia summary

Pemohon ('PP') memohon perintah sekatan terhadap responden ('R') untuk menghalangnya daripada membuat ulasan awam mengenai perbicaraan yang sedang dijalankan terhadap empat orang yang didakwa bersama membunuh seorang remaja ('Nhaveen'). Mendakwa sebagai aktivis sosial dan orang berpengaruh serta jurucakap keluarga Nhaveen, R telah menyiarkan pelbagai komen ('penerbitan') di halaman Facebooknya yang mengkritik kekurangan dalam siasatan polis terhadap kes itu, kelemahan dalam cara pendakwaan dijalankan dan menafikan keterangan saksi pendakwaan tertentu terutama penemuan doktor yang melakukan bedah siasat ke atas mayat mangsa. R mendakwa bahawa kes pendakwaan (yang sedang berjalan) telah dicemari oleh ketidakbenaran dan manipulasi keterangan untuk membolehkan individu tertentu terlepas daripada tanggungjawab atas pembunuhan Nhaveen. Penerbitan R telah menghasilkan banyak perbincangan awam mengenai kes pembunuhan dan perbicaraan di halaman Facebooknya. PP berhujah bahawa penerbitan R telah 'merampas' pendakwaan menjalankan perbicaraan dan telah menyebabkan hilang keyakinan orang ramai terhadap pihak pendakwaan. Sebagai contoh, PP berkata bahawa saksi pendakwaan penting, Previn, yang bersama mangsa pada masa itu, tidak pernah hadir ke mahkamah untuk memberi keterangan walaupun pihak pendakwaan beberapa kali cuba menghubunginya. PP juga berhujah bahawa pihak pendakwaan tidak berada dalam kedudukan untuk menyangkal secara terbuka tuduhan dan sindiran yang dibuat terhadapnya oleh R dan oleh itu perintah sekatan itu perlu bagi membolehkan pihak pendakwaan menjalankan kesnya tanpa tekanan atau campur tangan luar. Dalam menentang permohonan PP, R berhujah bahawa beliau bertindak jujur untuk menonjolkan pelbagai kelemahan dalam siasatan polis dalam kes itu dan cara pendakwaan dijalankan bagi memastikan mereka yang bertanggungjawab ke atas pembunuhan Nhaveen dibawa ke muka pengadilan.

Diputuskan, membenarkan permohonan PP:

(1) Mahkamah memberikan perintah sekatan terhadap R atas terma berikut: 'Bahawa Responden dan/atau ejennya yang mempunyai kaitan secara langsung dan/atau tidak langsung dengan Responden diperintah dan ditegah sementara menunggu pelupusan muktamad perbicaraan kes PA-45B-1–02/2018 untuk tidak menerbitkan dan/atau menyebabkan penerbitan dalam media massa atau membuat siaran dan/atau apa jenis

komunikasi dalam apa jua bentuk yang ditujukan kepada khalayak ramai dan/atau mana-mana pihak tertentu sebarang kata-kata, komen, perbincangan-perbincangan dan/atau kenyataan-kenyataan termasuk rujukan kepada sebarang komunikasi secara bertulis dan/atau tidak bertulis dengan pihak Pendakwaan dan/atau Polis Diraja Malaysia yang mana kata-kata yang digunakan oleh Responden dan/atau ejennya secara langsung atau tidak langsung yang boleh membawa maksud atau kesan, sama ada disengajakan atau tidak dan/atau diniatkan atau tidak, bahawa perbicaraan kes PA-45B-1–02/2018 dicemari oleh salah laku atau kecuaian atau kegagalan yang disengajakan oleh pihak Polis, Pendakwaan, saksi-saksi perbicaraan dan terkait dengan itu timbulnya spekulasi, tuduhan, tohmahan atau syak wasangka bahawa akan atau sedang berlaku satu perbuatan khianat, niat jahat, komplot atau salah laku untuk tidak melakukan siasatan, pendakwaan, penyampaian keterangan saksi dan pengendalian perbicaraan kes PA-45B-1–02/2018 secara benar, telus dan saksama mengikut kehendak undang-undang dalam pentadbiran keadilan. Kegagalan mematuhi Perintah akan menjadi satu penghinaan terhadap Mahkamah yang mulia ini' (lihat perenggan 57).

(2) Mahkamah bersetuju dengan PP bahawa penerbitan R menimbulkan risiko sebenar dan serta-merta atau ancaman prejudis kepada perbicaraan adil orang yang dituduh dan pentadbiran keadilan dalam perbicaraan yang sedang berjalan. Risiko yang akan dihadapi oleh pihak pendakwaan dalam menjalankan perbicaraan vis a vis kelakuan saksi-saksinya dan serangan kelakuan jahat oleh pihak pendakwaan tidak boleh dipampas dengan mana-mana remedi lain. Oleh itu, perintah sekatan R adalah wajar untuk pemeliharaan hak pendakwaan untuk menjalankan perbicaraan tanpa rasa takut, tekanan kecaman awam yang tidak wajar, syak wasangka salah laku niat jahat atau risiko mana-mana saksinya tidak hadir, tidak bekerjasama atau takut. Atas kedudukan yang sama, ia juga wajar dengan hak orang yang dituduh untuk perbicaraan yang adil dan andaian tidak bersalah sehingga dibuktikan bersalah (lihat perenggan 40 & 53).

(3) Perintah sekatan yang meluas terhadap R, seperti yang dipohon oleh PP, adalah tidak perlu kerana ia akan menceroboh hak perlembagaan R untuk menyatakan apa-apa penerbitan fakta dan bona fide yang ingin dibuatnya berhubung perbicaraan itu. Keseimbangan harus dicapai antara objektif perintah sekatan dan hak R untuk bercakap dan bersuara. Perintah sekatan yang telah dibuat oleh mahkamah tidak akan menyekat hak R untuk terus berkomunikasi dengan polis atau pihak pendakwaan mengenai sebarang perkara yang bona fide. Walau bagaimanapun, sementara menunggu selesai perbicaraan, perintah sekatan pada dasarnya akan menyekat R daripada membuat penerbitan atau komen yang mempunyai kesan menimbulkan spekulasi, syak wasangka atau tuduhan

kelakuan haram, menutup dan memanipulasi keterangan oleh polis, pihak pendakwaan dan saksi pihak pendakwaan (lihat perenggan 55–56).

(4) Pihak pendakwaan tidak boleh memasuki arena perbahasan awam untuk mengulas tentang perjalanan perbicaraan dan hala tujunya semasa perbicaraan sedang berjalan kerana sebarang ulasan sedemikian mungkin menjejaskan orang yang dituduh yang dianggap tidak bersalah sehingga dibuktikan sebaliknya. Pihak pendakwaan hanya boleh menjawab sebarang dakwaan salah laku dengan tetap dan terus menjalankan perbicaraannya dengan jujur dan berintegriti sebaik mungkin dan menyerahkan kepada hakim bicara untuk memutuskan pada akhir perbicaraan berdasarkan penilaian semua keterangan (lihat perenggan 51–52).

(5) Mahkamah mendapati bahawa penerbitan R bukanlah pelaporan objektif dan fakta atau perbincangan bona fide perbicaraan yang sedang berjalan. Sebaliknya, mereka dipenuhi dengan spekulasi, tuduhan dan sindiran konspirasi untuk meruntuhkan pentadbiran keadilan melalui manipulasi keterangan oleh saksi, siasatan yang tidak lengkap dengan sengaja, pengabaian tugas oleh pegawai polis dan pendakwaan dan penutupan untuk melindungi orang tertentu daripada didapati bertanggungjawab atas kematian Nhaveen. Walaupun R mempunyai asas untuk membuat aduan terhadap polis atau pihak pendakwaan, dia sepatutnya memohon ganti rugi melalui saluran yang sepatutnya dan bukannya melancarkan kempen awam untuk membuat tuduhan kelakuan jahat terhadap pihak pendakwaan dan saksinya ketika perbicaraan masih berjalan. Kerja-kerja pendakwaan masih belum selesai dan naratif penuh kesnya masih belum terbuka. Komen dan kutukan R adalah jelas pramatang dan penghakiman awal serta mencemarkan imej dan kredibiliti pihak pendakwaan dan saksinya serta mengancam untuk mengganggu pentadbiran keadilan (lihat perenggan 33–35 & 43).

(6) Tindakan R adalah *sub judice* berhubung dengan perbicaraan yang sedang berjalan. Adalah mungkin untuk menjangkakan bahawa saksi yang masih belum memberi keterangan mungkin, berdasarkan kenyataan keras yang dibuat oleh R, mungkin enggan memberi keterangan atau mungkin menjadi tidak bekerjasama atau lupa sehingga menyukarkan pihak pendakwaan untuk mendapatkan keterangan material untuk membantu mahkamah mendapatkan kebenaran perkara yang sedang dibicarakan. Terdapat risiko bahawa saksi masa depan mungkin memutarbelitkan keterangan mereka, sehingga menjejaskan kes pendakwaan atau orang yang dituduh, kerana bimbang mereka mungkin dipulaukan di khalayak ramai kerana sesuatu yang mereka ada, atau tidak, katakan dalam keterangan. Telah pun, saksi pendakwaan penting, Previn, gagal hadir untuk memberi keterangan tanpa sebarang

penjelasan walaupun beberapa kali pihak pendakwaan cuba menghubunginya (lihat perenggan 37–39 & 44).]

Cases referred to

Ambard v Attorney General for Trinidad and Tobago [1936] AC 322, PC (refd)
Bunya ak Jalong v PP [2015] 5 MLJ 72; [2015] 5 CLJ 893, CA (refd)
Dagenais v Canadian Broadcasting Corp [1994] 3 SCR 835, SC (folld)
Dato' Sri Mohd Najib bin Hj Abd Razak v PP [2019] 8 MLJ 624; [2019] 4 CLJ 799, HC (folld)
Dato' Sri Mohd Najib bin Hj Abdul Razak v PP [2019] 4 MLJ 74; [2019] 4 CLJ 723, CA (folld)
Dato' Sri Mohd Najib bin Hj Abd Razak v PP [2019] 4 MLJ 281; [2019] 4 CLJ 705, FC (folld)
Foo Tseh Wan v Toyota Tsusho (M) Sdn Bhd & Anor [2018] 9 MLJ 664; [2018] 4 CLJ 653, HC (distd)
Iris Koto (M) Sdn Bhd v Chong Sam Mooi & Anor [2019] MLJU 619; [2019] 1 LNS 914, HC (refd)
Johnson Tan Han Seng v PP; Soon Seng Sia Heng v PP PP v Chea Soon Hoong; Teh Cheng Poh v PP [1977] 2 MLJ 66, FC (refd)
Krishnan v PP [1987] 1 MLJ 292, SC (refd)
Loot Ting Yee v Tan Sri Sheikh Hussain bin Sheikh Mohamed & Ors [1982] 1 MLJ 142; [1982] CLJ 66A, FC (refd)
PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration Centre, intervener) [2019] 4 MLJ 747; [2019] 6 CLJ 1, FC (refd)
PP v Choo Chuan Wang [1992] 2 CLJ 1242, HC (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116; [1976] 1 LNS 180 (refd)
PP v Lee Eng Kooi [1993] 2 MLJ 322; [1993] 2 CLJ 534, HC (refd)
R v Boucher [1954] SCJ No 54, SC (refd)
Rosli bin Yusof v PP [2021] 4 MLJ 479; [2021] 1 LNS 796, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 13
Federal Constitution arts 5(1), 10, 126
Penal Code s 302

Khairul Anuar bin Abdul Halim (with Mohd Amril bin Johari, Noor Azura bt Zulkifle and Yazid Mustaqim bin Roslan) (Deputy Public Prosecutor, Penang State Legal Advisor's Office) for the applicant.
Arun Ganesh Boopalan (with Rajesh Nagarajan and Sachpreetraj Singh Sohanpal) (Raj & Sach) for the respondent.

Mohd Radzi Abdul Hamid JC:

INTRODUCTION

[1] This is a decision and grounds of judgment regarding an application by the prosecution against the respondent for a pre-emptive gag order ('application'). The application and the affidavit supporting the application by ASP Nor Hisham bin Hj Ramli ('affidavit in support') appear in encls 1 and 2.

[2] The matters complained of in the application relates to certain publications made by the respondent posted on his Facebook account pertaining to the conduct of the police, prosecution and prosecution witness in the course of the trial of Case PA-458-1–02 of 2018 ('publications').

[3] Case PA-458-1–02 of 2018 is an on-going trial of four accused persons who are charged under s 302 of the Penal Code for the murder of one Nhaveen a/l Thirumaran ('victim') ('trial'). Based on the prosecution's list of witnesses a total of 17 persons will give evidence in the course of the trial. As at the last hearing date on 5 May 2021 six witnesses have given their evidence including PW2 (Dr Amir Saad, pathologist) and PW 5 (Madam Shanti a/p Dorairaj, mother to the victim) ('Madam Shanti').

PRELIMINARY OBJECTIONS

[4] At the outset of the hearing of this application, learned counsel for the respondent raised two preliminary objections which in their contention rendered the application legally incapacitated and therefore should be dismissed ad limine.

[5] The two preliminary objections are that: (a) the deponent of the affidavit in support is not the correct and proper person to affirm the affidavit in support; and (b) that the affidavit in support was not affirmed before a commissioner of oaths.

[6] With regards to the first point, learned counsel for the respondent submitted that since the applicant in the application is the public prosecutor then any one of the deputy public prosecutor present in arguing for the application, in particular Amril bin Johari should have affirmed the affidavit in support and not ASP Nor Hisham bin Hj Ramli ('the deponent'). Learned counsel for the respondent referred to the case of *Foo Tseh Wan v Toyota Tsusho (M) Sdn Bhd & Anor* [2018] 9 MLJ 664; [2018] 4 CLJ 653 where the High Court held upon revision that an application made by counsels watching brief in a criminal proceedings at the sessions court did not have the locus standi to make applications in a criminal trial since they were not a party to the criminal

proceedings. Relying on that decision learned counsel for the respondent argued that the deponent had no role in the current application and thus had no locus standi to support the application.

[7] In counter argument, learned deputy public prosecutor submitted that the background facts as averred by the deponent in the affidavit in support that lead to the posting of the publications by the respondent were in his personal knowledge. They served as the valid basis for the filing of the application and therefore this court should not hold the deponent as not having the locus standi to affirm the affidavit in support to set the application into motion.

[8] After considering the contents of the affidavit in support and the publications, this court is satisfied that the deponent was a proper person to affirm the affidavit in support. The material matters alleged by the respondent against the police and the public prosecutor which later became the subject matter of the publications arose initially from events involving the deponent and his department which are within his knowledge. In this court's view the decision in *Foo Tseh Wan* has no relevance to the consideration of the instant matter. In that case, the applicant was a person who was not a party to the criminal proceedings whilst in the present case the application is made by the public prosecutor and not the deponent himself. Therefore, the issue of locus standi should not arise. In any event, the application was then further supported by the affidavit in reply of Amril bin Johari (encl 10).

[9] With regards to the second point, learned counsel for the respondent argued that whilst it was conceded that the Covid Movement Control Orders had made the affirmation of affidavits difficult and that para 7 of the Directions issued by the Chief Justice on 31 May 21 (Arahan Ketua Hakim Negara, Bilangan 8 Tahun 2021) ('Directions') had provided relaxation to the requirements regarding affirmation of affidavits in any application supported by a certificate of urgency, yet the applicant had failed to file an affirmed copy of the affidavit in compliance with para 7 of the Directions after the Ministry of International Trade and Industry had allowed the resumption of the services of commissioners of oath on 28 June 21 and the counters for the taking of oaths at the Courts of Georgetown, Penang had resumed on 1 July 2021. Since the application was filed on 18 June 2021 and until the hearing of the application on 28 July 2021 an affirmed copy of the affidavit in support has yet to be filed, there is therefore no affidavit filed before this court and as such there is no application to be heard by this court. Relying on the authority of *Iris Koto (M) Sdn Bhd v Chong Sam Mooi & Anor* [2019] MLJU 619; [2019] 1 LNS 914, it was submitted that an unaffirmed affidavit amounts to no affidavit at all.

[10] In response to those arguments, deputy public prosecutor had explained that they had in fact secured an affirmation of the affidavit in support

but only on 27 July 2021. A copy of the affirmed affidavit in support was then extended to this court and the respondent. The deputy public prosecutor submitted that there was a delay in securing the affirmation of the affidavit in support as his department was having difficulties in securing the timely re-execution of the affidavit in support by the deponent who is a senior police officer. Notwithstanding the delay, it was contended that para 9 of the Directions effectively barred the respondent from raising any objection relating to the filing of unaffirmed affidavits.

[11] It would be relevant to reproduce paras 7 and 9 of the Directions:

> B. PENYEMPURNAAN AFIDAVIT BAGI KES PERAKUAN SEGERA ATAU PERMOHONAN SEGERA
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> 7. Bagi apa-apa kes perakuan segera atau permohonan segera, pihak-pihak bolehlah memfailkan affidavit yang belum disempurnakan dengan aku janji untuk menyempurnakan affidavit tersebut dalam tempoh empat belas (14) hari selepas:-
>
> (a) tamatnya tempoh PKP; atau
>
> (b) apa-apa arahan yang dikeluarkan oleh Kerajaan yang membenarkan Perkhidmatan Kehakiman dan Perundangan untuk beroperasi dalam tempoh PKP.
>
> SEKATAN DALAM MEMBUAT BANTAHAN TERHADAP KET/DAKPATUHAN TATACARA
>
> 9. Bagi maksud pemakaian Arahan ini, pihak-pihak tidak boleh membangkitkan apa-apa bantahan mengenai ketidakpatuhan dari segi tatacara berhubung dengan:-
>
> (a) kehendak pematuhan tempoh masa; dan
>
> (b) kehendak penyempurnaan pemfailan affidavit.

[12] After considering both parties arguments, this court accepts the explanation of the deputy public prosecutor on the delay in getting the re-execution of the affidavit in support by the deponent and therefore exercises its discretion to allow the affirmed affidavit dated 27 July 2021 as the affidavit perfected in support of the application (encl 17). It would have been a different situation if the applicant failed to produce an affirmed affidavit on the date of hearing, in which case this court would have agreed with the respondent that there was no affidavit to support the application. In addition, the case of *Iris Koto* was not subjected to the exceptional circumstances faced by litigants and the courts caused by the Covid pandemic and Movement Control Orders. The Directions were issued to address some of the procedural issues faced by litigants and in this court's view a wide latitude of discretion should be exercised by the courts in favor of the affected parties. It is only when the failure to comply with the Directions is blatant and unexplained should the discretion be exercised against the party seeking to rely on it.

MERITS OF THE APPLICATION

[13] After hearing the able and well-presented arguments by learned deputy public prosecutors for the applicant and learned counsel for the respondent and after considering all the affidavits supporting the application (encls 2, 10, 11 and 17) and all those opposing the application (encls 7, 8, 9, 12, 13 and 14), this court finds and decides as follows.

Law and principles

[14] In embarking on its evaluation of the merits of this application, this court is principally guided by the decisions of the High Court [2019] 8 MLJ 624; [2019] 4 CLJ 799, Court of Appeal [2019] 4 MLJ 74; [2019] 4 CLJ 723 and the Federal Court [2019] 4 MLJ 281; [2019] 4 CLJ 705 in the case of *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* where the laws and principles governing pre-emptive gag orders were extensively discussed and stated.

[15] There did not arise at hearing of this application the issue of whether thiscourt has the jurisdiction to hear an application for a pre-emptive gag order. Nonetheless, for the sake of brevity, as held by the High Court and then affirmed by both the Court of Appeal and Federal Court in *Dato' Sri Mohd Najib bin Hj Abd Razak* this court has the necessary jurisdiction premised on arts 10 and 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964, to hear and grant such an application subject to the satisfaction of certain conditions.

[16] Pertaining to the applicable law and principles in the consideration of an application for a gag order, as extensively discussed by the High Court and later affirmed by the Court of Appeal and Federal Court in *Dato' Sri Mohd Najib bin Hj Abd Razak*, the conditions that the applicant must satisfy before this court can grant this application are:

(a) whether there is an immediate risk or threat of prejudice to the fair trial of the accused and the administration of justice;

(b) whether there is absence of alternative measure; and

(c) the order that is sought after is proportionate in reference to the competing interests of free speech and risk of prejudice to a fair trial and the administration of justice.

[17] In considering all those conditions this court must also consider if there is a usurpation of the role of this court in adjudicating the trial and whether there is an adverse discussion, comment and accusation against the conduct of

A the trial by the prosecution and the credibility of witness testimonies that is prejudicial to the administration of justice.

[18] In the deliberation of those conditions and questions, this court is reminded that whilst any condemnation and prejudgment of the outcome of a trial should not be tolerated, the right to free speech that includes public discussions on matters of public interest must not be unjustifiably curtailed. A balance must be struck between the competing interests of a fair trial and the freedom of speech where emphasis must be given to the preservation of freedom of free speech and expression.

The publications

[19] The matters complained of by the applicant and which are at the core of this application appear in exh NHR3 of the affidavit in support (encl 2). These publications were posted on the respondent's Facebook page and accessible to the public. The respondent does not dispute that those publications were made and the Facebook page belongs to him. From the nature comments and dates on those publications, it is evident that they were made after the conclusion of the last trial date on 5 May 2021.

[20] The relevant publications are briefly referred as follows:

(a) p 1 of exh NHR3 — a narrative accusing a doctor who conducted the autopsy on the victim of not telling the truth, manipulation of evidence and that there is a hidden hand interfering with the disclosure of evidence;

(b) p 2 — a narrative that seeks to contradict or challenge evidence what was presented at the trial or will be presented at the trial;

(c) p 4 — a narrative regarding a piece of evidence not considered by the police with a photo of the State Prosecution Office;

(d) p 6 — a narrative of a cover up and that a material witness in the trial Previin a/l Tana Segaran ('Previin') is not safe;

(e) pp 11–14 — narratives of an alleged cover up; and

(f) p 25 — a narrative that it was in the better interest of Previin to be under the protection of the respondent than the police after certain deaths were allegedly made on him.

[21] This court observed that the publications made by the respondent had caused certain comments from the public. These comments were posted on the respondent's Facebook page and can be viewed by the public:

(a) p 17 — insinuation of cover up by public servants that is the police;

(b) p 18 — request for publication of suspects name followed by a reply by respondent saying 'soon'. This has the effect of making the public believing that there are other suspects and that these suspects are not charged with the offence;

(c) p 19 — comments that there has been a willful failure in the administration of justice; and

(d) p 20 — 'Why not share with us all who are these hidden hands?'. This has the effect of encouraging members of the public to speculate on alleged conspirators or schemers.

Arguments by the applicant

[22] The arguments supporting the application were laid out in the written submission presented by the applicant and were also orally presented to this court. These arguments can be briefly summarised as follows:

(a) that the publications by the respondent amounted to hijacking the prosecution's role in conducting the trial;

(b) that the publications have resulted in Madam Shanti who had appeared as SP5 and Previin who will be called as the star witness for the prosecution losing their confidence in the credibility of the prosecution (as reflected in their respective affidavits for the respondent). In particular, with regards to Previin the loss of confidence was evidenced by his willful failure to attend the court hearing on 6 July 2021 when he was scheduled to give evidence for the prosecution;

(c) that the prosecution is without remedy to bring any defamatory suit against the respondent as it is against public policy for the prosecution to bring such an action; and

(d) that the gag order is proportionate to the right of prosecution to conduct the trial of from any accusations of misconduct and free from any interference on its witnesses.

Arguments by the respondent

[23] The respondent presented the following arguments:

(a) that the respondent is a social activist and influencer who acts in the capacity of spokesperson for the Nhaveen Action and Investigation League and family of the victim namely Madam Shanti and Previin who is the main witness for the prosecution;

(b) the respondent acted to bring to the awareness of the public certain alleged misconduct by the police, the prosecution and prosecution witness after the conclusion of the last hearing date of 5 May 2021. The

publications by the respondent were motivated and driven by his and Madam Shanti's frustration that the police had allegedly refused to entertain their request for the consideration of new evidence relevant to the trial and that his and Madam Shanti's attempt through their legal advisors (who are also the same law firm acting for the respondent in this proceedings) to meet the deputy public prosecutor was also met with a negative response;

(c) that the publications were made in the honest interest of advancing the cause of the family of the victim in ensuring that all those who were responsible for the death of the victim are brought to justice; and

(d) that those publications and comments by the public on the respondent's Facebook page should not influence this court as the ultimate decider of the issues at the trial is the judge and that as described by the Federal Court in *Dato' Sri Mohd Najib bin Hj Abd Razak* the judge being a trained person is not easily swayed by irrelevant information. To quote the Federal Court:

> [35] A judge is a legally-trained individual who decides the case on the merits based on the law as applied to the facts. In determining the outcome of a matter, he or she is a dispassionate arbiter who takes into account only relevant considerations. A judge cannot be compared to a layman juror. He or she is not easily swayed by irrelevant information. Also, if a trial judge commits an error of law of fact that decision is entitled to be impugned and subsequently corrected on appeal.

Deliberations by this court

[24] It is evident from the reading of the affidavits for the respondent (encls 7, 8, 9, 12, 13 and 14) that the respondent together with Madam Shanti and Previin had sought to meet the police and the prosecution for the following purposes:

(a) to share information on certain new evidence not considered by the police;

(b) to raise certain issues regarding the investigation into the events and persons related to the death of the victim;

(c) to express their concern over how the prosecution was conducted where in their belief certain crucial questions and evidence were not put forth to and elicited from SP2 and Madam Shanti (SP5); and

(d) their perceived lack of effort by the prosecution to interview these witnesses in preparation for the trial.

[25] The respondent claimed that he, Madam Shanti and Previin were disappointed and dismayed by the alleged refusal of the police and the office of the deputy public prosecutor to effectively entertain their requests for meetings to discuss the above matters. A letter dated 14 June 2021 from the office of the State Legal Advisor's office, Penang addressed to the respondent's legal advisor's firm was attached as exh AD2 in the respondent's affidavit (encl 7). That letter was relied on by the respondent to prove the reluctance of the deputy public prosecutor's office to meet with the respondent and his legal advisors based upon reasons stated therein.

[26] Reading the affidavits for the applicant as found in encls 10 and 11 in reply to the affidavits filed by the respondent, in particular the affidavit of deputy public prosecutor Amril bin Johari in encl 10 ('Amril'), it is equally evident that there are serious disputes on the facts as alleged by the respondent through his affidavit and the affidavits of Madam Shanti and Previin. Amril specifically denied that he had failed or refused to meet Madam Shanti in preparation for the trial and that he would have eventually met Previin for the same purpose.

[27] At the hearing of this application there were heated arguments presented by both learned counsel for the respondent and the deputy public prosecutor on those issues, in particular on the alleged refusal of the prosecution to meet the respondent, Madam Shanti, Previn and their legal advisors.

[28] Be that as it may, whilst those events and disputed facts may have served to enlighten this court on what had transpired in the background between the respective parties and the motivation of the respondent towards making those publications, this court's attention however, must be primarily focused on the fact and the nature of the respondent's publications. Were the respondent's publications as described by the House of Lords in *Ambard v Attorney General for Trinidad and Tobago* [1936] AC 322 fair comments and criticisms made in good faith or were they made out of improper motives, malice or an attempt to impair the administration of justice?

[29] As correctly pointed out by learned counsel for the respondent a judge sitting alone should not be persuaded by public discussions outside the court room. His duty is to deliberate on all evidence and issues and make the necessary decisions at the end of the trial. Nonetheless, whilst this court is confident in its own ability to carry out that duty, this court must equally take into consideration the effect of such publications on the on-going trial, in particular the witnesses who have yet to give their evidence and the conduct of the trial by the prosecution.

[30] The administration of justice is not only about the judge. As held in the case of *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322; [1993] 2 CLJ 534, the link in the administration of justice includes the investigation officers, the prosecution, counsels and the judge. As much as the meaning of administration of justice includes the right of an accused to a fair trial, it must also equally include the right of the prosecution to a fair and proper conduct of a trial. The prosecution has the right to conduct its trial free from any undue influence, malicious accusations and impairment of any kind whether on itself or its witnesses. It would be relevant for this court to quote from Suffian LP in the case of *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66 (and other cases) where His Lordship stated:

> In deciding that the Attorney-General is not constrained by article 8 when deciding whether or not to prosecute and if so on what charge, whether a lesser or a greater one, it must not be thought that he may act dishonestly. The public of whose interest he is the guardian has a right to expect him to act honestly, without fear of powerful national and local figures or of the consequences to him personally or politically, and without favouring his relatives and friends and supporters, his principal concern being to maintain the rule of law so that there will be no anarchy and to maintain standards in public life and the private sector; and if he did not do his duty honestly and properly the public would be able to show their disapproval not however in the courts but elsewhere and in the last resort by voting against the party of which he is a member. In England the Attorney-General's decision to withdraw the charge in the *Campbell* Case in 1924 resulted in a change of government, see Chapters 10 and 11 of *The Law Officers of the Crown* by Professor J LI J Edwards.

[31] In *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; [1976] 1 LNS 180, Abdoolcader J (as he then was) had the opportunity to state the meaning of the 'conduct' of a trial by the prosecution:

> 'Conduct' in art 145(3) cannot but refer to the conduct of prosecutions in court, as it indeed appears *ipsissimis verbis* in s 377 of the Code. And 'control and direction' in s 376(i) of the Code is in respect of all criminal prosecutions and proceedings, and not of criminal procedure or the jurisdiction of the courts.
>
> 'Conduct' of criminal prosecutions and proceedings in art 145(3) cannot connote the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so. Any contrary contention would in effect in my view be tantamount to the suggestion of the public prosecutor arrogating to himself the legislative powers vested in Parliament under Item 4 and in particular paragraph (b) thereof in List I (Federal List) in the Ninth Schedule to the Constitution, with perhaps also the not inconceptible resultant intrusion or at least a more than peripheral incursion into the sphere of art 121(1) of the Constitution which provides that the judicial power of the Federation is vested in two High Courts and in such inferior courts as may be provided by federal law — namely, the Subordinate Courts Act, 1948 which specifies the subordinate courts and their respective civil and criminal jurisdiction.

Pursuing its signification, 'to conduct' means 'to lead, guide, manage' (*In re Bhupalli Malliah* AIR 1959 And Pra 477; *Pride of Derby v British Celanese Ltd* [1953] 1 Ch 149, 167 at p 167 per Lord Evershed, MR). It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved in the course of the trial and the attitude to be adopted by the prosecution towards material objections raised or demands made by the accused with respect to the evidence.

[32] Thus, by that definition, the prosecution has the right to structure and strategise the direction of its case as it sees fit and advantageous including the approach in eliciting evidence from its witnesses.

[33] Reverting back to the publications, it is this court's view that the publications complained of as appearing in exh NHR3 show that they are riddled with speculation, accusation and insinuations of some conspiracy to subvert the administration of justice through manipulation of evidence by witness, willful incomplete investigation, cover up of persons who are also guilty for the death of the victim and abandonment of the duties of a public officer whether it be the police or the prosecution.

[34] In this court's opinion even if the respondent had some basis of complaint against the police or the prosecution as averred in his affidavit in reply in encls 7 and 12, it is not a license for the respondent to embark on a public crusade of accusations of malicious conduct on the prosecution and its witness when the trial is still in progress. There are more material witnesses who have yet been called to give evidence. The prosecution's work is still in progress and the full narrative of the prosecution's case is still unfolding. Any comment and condemnation on the prosecution's conduct of the trial are therefore clearly premature and a pre-judgment.

[35] Furthermore, the publications were made before such complaints were finally exhausted and resolved by the police or by the Attorney General's Chambers. If at all the refusal by the prosecution to meet the respondent and his legal advisors were, in the opinion of the respondent unjustified and not in the interest of the conduct of the trial, the respondent was not without avenue to exhaust all efforts with the Head of the Prosecution of the Attorney General Chambers, failing that, the solicitor general and following that, the Attorney General. Although a letter dated 10 June 2021 was addressed to the Head of prosecution of the Attorney General Chambers copied to the Attorney General and Head of Prosecution of the Attorney General's Chambers for the State of Penang (attached as exh SD2 in encl 9, affidavit in reply of Shanti a/p Dorairaj), in this court's view it was incumbent upon the respondent to exhaust all those efforts through proper channels instead of choosing to go to the public with sensational accusations and subjecting the prosecution's office to threat of

a hunger strike as appearing at p 18 of exh NHR3. Whilst those matters may serve to narrate the reasons for the continued publications by the respondent, the respondent cannot embark on a crusade posting public comments that tantamount to tainting the image and credibility of the prosecution and its witness in an on-going trial. The motives for those publications, however bona fides they are to the respondent cannot serve as justification for any publication that threatens to interfere with the administration of justice. To put it simply, the end does not justify the means.

[36] As pointed out by this court to learned counsel for the respondent, this court must look at the effects of such postings on the on-going trial, in particular on the witnesses who are yet to provide their respective testimonies. Although as stated in the Federal Court decision of *Loot Ting Yee v Tan Sri Sheikh Hussain bin Sheikh Mohamed & Ors* [1982] 1 MLJ 142; [1982] CLJ 66A the trial is determined by a judge sitting alone and that potential witnesses would not be impaired in giving their evidence since their evidence will be evaluated by the judge, such observation in this court's view was made by the Federal Court based upon the facts presented there which are different from the facts in the present application. Similarly, although the Court of Appeal in *Dato' Sri Mohd Najib bin Hj Abd Razak*'s case echoed the same sentiment in its decision, the application of such view must be dependent on the facts of each case. In *Dato' Sri Mohd Najib bin Hj Abd Razak*'s case the application was made by the accused person against the media at large, whilst in the present application, the application is made by the prosecution against a specific member of the public whose publications have touched upon the integrity of the trial and the prosecution witness in an on-going trial.

[37] In this court's view the respondent had assumed the role of prosecutor and judge in casting aspersions on the integrity of the witness and the conduct of the trial. There is an implicit speculation that the prosecution of the case has been compromised and that there is manipulation of evidence to favor some unknown person or persons. In this court's mind that amounts to an act that is *sub judice* to the on-going trial.

[38] It is not too unlikely to anticipate that any prospective witness having had noticed of the scathing remarks made by the respondent against the doctor who undertook the autopsy of the victim (SP2), could possibly become a reluctant or uncooperative or forgetful witnesses thereby posing difficulties to the prosecution in eliciting material evidence. There is therefore a risk that further witnesses may color their evidence to the prejudice of the prosecution's case or the accused persons out of fear that they will be ostracized in public for something they have or may have failed to state in evidence. It must be pointed out that the SP2 is not the only medical officer listed as witness in the trial and therefore any issues ventilated by the respondent when the trial is not yet

concluded is seriously premature and had unjustifiably casted suspicion and doubt on the conduct of the prosecution's case.

[39] It is also clear to this court that the complaints of the alleged conduct of the prosecution and the respondent's postings had an impact on the readiness of Previin to appear as a witness for the prosecution when he failed to appear in court on 6 July 2021 without any explanation despite multiple attempts by the prosecution to reach him.

Final analysis and conclusion

[40] In this court's final analysis and conclusion, this court agrees with the applicant that there is a real threat and risk to a fair trial and the administration of justice in the on-going trial.

[41] All the accused persons in the on-going trial are entitled to the benefit of the presumption innocence until proven guilty. Any unproven speculation of some cover up or misdeed by the police, prosecution and its witness will cast the aspersions that these parties are in cohorts with the accused persons and therefore these accused persons must in all probability be guilty. The determination of the guilt or innocence on an accused person can only be achieved in accordance with the requirements of law by a court of law and not the court of public opinion, speculation and pre-judgment. As held by the Supreme Court in *Krishnan v Public Prosecutor* [1987] 1 MLJ 292:

> It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death. But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.

[42] Any accused person is entitled to a fair trial as implied in art 5(1) of the Federal Constitution. As held by Edgar Joseph Jr J (as he then was) in *Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242:

> ... Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial court established by law.

[43] This court does not find that the publications were made as an objective and factual reporting of the trial or a bona fide discussion on the on-going trial by a member of the public. Whilst media publicity or even critical and

informed discussion of a case cannot automatically amount to serious prejudice to the criminal proceedings, in this court's mind publications made with clear use of language intended to cast suspicion and accusation of conspiracy of illegal acts by witnesses and the prosecution in an on-going trial is plainly prejudicial to the criminal proceedings and the administration of justice.

[44] If the prosecution is prejudiced by its own witness then the prosecution is handicapped in performing its public duties in assisting the court to find the truth of a matter under trial. It would lead to the failure of the prosecution in discharging its duty to call credible witnesses to present the narrative of its case. In *R v Boucher* [1954] SCJ No 54, the Supreme Court of Canada held:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

[45] Closer to home, the Federal Court decision in *Rosli bin Yusof v Public Prosecutor* [2021] 4 MLJ 479; [2021] 1 LNS 796 had stated as follows:

> [29] We begin with the discussion on the proper role of the prosecutor. The prosecutor in a criminal trial occupies a special position. His or her role is unlike the counsel for a party in a civil trial or counsel for the accused. Unlike other clients who have interest in securing a conviction at all costs, prosecutors are often called 'minister of justice' and their role is to present the whole case to the court and assist the court in finding out where the truth lies. Due to their special role in criminal trials, the prosecutors are under several well-defined duties including: (i) duty of disclosure (see s 51A of the CPC), (ii) duty to call all credible and relevant witnesses, and (iii) duty to conduct the case fairly (see *R v Banks* [1916] 2 KB 621; *R v Sugarman* [1985] 25 Cr App R 109; *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205).
>
> [30] We would like to emphasise that, at all times, prosecutors are expected to present their case fairly, impartially and professionally and assist the court in arriving at the truth by producing all the relevant facts to the court as 'Officer of the Court' (See *R v Guerin* [1931] 23 Cr App R 39).
>
> [31] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312; [2010] 4 AMR 292 (FC), this court observed at (p 331 (MLJ); p 310 (AMR)):
>
> > The right to a fair trial is of course a universal principle. It is inviolable.
>
> The same case quoted with approval a passage from the judgment of Mohd Zawawi Salleh JC (now FCJ) in *Public Prosecutor v Mohd Fazil Awaludin* [2009] 7 MLJ 741; [2009] 2 CLJ 862, which reads:

The principle of a fair trial is sacrosanct in all civilized legal jurisdictions. It is a principle of universal application. In Malaysia, the principle of fair trial and fairness have been long established and recognized in several decisions.

[46] In the case of *Bunya ak Jalong v Public Prosecutor* [2015] 5 MLJ 72; [2015] 5 CLJ 893 the Court of Appeal had the opportunity to describe the role of the public prosecutor as such:

[10] The role of the public prosecutor is quasi-judicial. It is to:

(a) review the evidence in the investigation papers;

(b) determine if the evidence in the investigation papers proves beyond reasonable doubt that an offence had been committed; and

(c) authorise the charges upon which the accused is to be charged and punished.

[11] This quasi-judicial function is essential, because a decision to prosecute necessitates the accused to incur time and legal expense to defend himself, but for which there is no provision that he can recover costs if he is acquitted. For this reason, and to ensure there can be no doubt the decision was to prosecute and not persecute, there is the responsibility for the public prosecutor to be satisfied that there is an offence according to law and that the investigation papers contain proof beyond reasonable doubt. The notion of 'if in doubt, prosecute and leave it to the court' is not only abandonment of that quasi-judicial function in the exercise of the absolute discretion to prosecute but also exposes prosecution to falling conviction rates. If the public prosecutor itself is in doubt, what court could conceivably find an accused, defended by counsel, guilty?

[12] Ensuring that an innocent man does not run risk of being victimised or harassed by wrong exercise of powers of prosecution:

(a) there must be charge for an offence known to the law; and

(b) that the facts constituting the offence are proved to the standard of proof of 'proved beyond reasonable doubt'.

[47] In addition, this court also finds that the conduct of the respondent on 28 July 2021 when this application was fixed for hearing before this court supports the applicant's case against the respondent.

[48] Before the hearing of this application commenced, this court's attention was brought to a social media WhatsApp posting made and circulated by the respondent in direct contradiction to the advice of respondent's learned counsel and learned counsel's undertaking made to this court on 25 June 2021 that the respondent shall refrain from making any public statement pending the disposal of this application. When this was brought to the attention of learned counsel for the respondent, he confirmed after consulting with the respondent that the respondent did make such message. It is relevant to quote

A the relevant parts of that message:

> PRESS MEET: NHAVEEN'S CASE: GAG ORDER AGAINST ACTIVIST ARUN DORASAMY — GREATER CONSPIRACY
>
> The decision of the Penang DPP to apply for GAG ORDER against social media influencer activist and official victim's spokesman Arun Dorasamy proves greater conspiracy plan to conceal the truth in this Public Interest Case. Refusal of the DPP to meet the Nhaveen's family or Previin or their counsels throws a big question mark, who are they defending?

[49] The language of that message clearly suggests that the application is a sinister effort by the prosecution to shut the respondent in an effort to protect some other person or persons involved in the murder of the victim. In this court's view the message had the implication that if this court were to grant that order, then this court was equally complicit in that sinister plot. Notwithstanding that the respondent apologised to this court and this court accepted the apology, yet damage was done. The choice of words used.were deliberate and the accusation had gone public and along with it the possible negative impression that the public may have on the integrity of this court.

[50] Hence, it falls on this court's to jealously guard and preserve the public's confidence and respect in the concept of judicial power and the judges who exercise such power. As held by the Federal Court in *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration Centre, intervener)* [2019] 4 MLJ 747; [2019] 6 CLJ 1:

> [41] The courts of justice are the bulwark of a nation. Alexander Hamilton famously recognised, in the doctrine of the separation of powers, that the legislature controls money, the executive controls force and the Judiciary controls nothing. It is on public confidence that the Judiciary depends, for the general acceptance of its judicial decisions, by both citizens and the government. The public conforms to the decisions of the Judiciary, because they respect the concept of judicial power and the judges who exercise such power (see *Public Confidence in the Judiciary* by Murray Gleeson, Judicial Conference of Australia, Launceston, 2002).
>
> [42] Therefore the trust and confidence of the people in the judicial system to deliver impartial justice comprises the very foundation of the Judiciary.

[51] It is also plainly clear that the prosecution cannot enter the arena of public debate to comment on its conduct of the trial and its direction when the trial is on-going as any comments made especially in a criminal trial will have the risk of prejudicing all the accused persons who are presumed innocent until proven otherwise (see the article entitled 'The Prosecutor's Duty of Silence' by Professor Bennet L Gersham, 79 Alb L Rev 1183).

[52] One of the considerations of the High Court in rejecting the application in *Dato' Sri Mohd Najib bin Hj Abd Razak*'s case was that the

applicant, his family members and counsel had provided interviews to the media and the court found that those interviews amounted to balance reporting of rival views on the matter. However, such interviews and rival views are not available to the prosecution during the course of the trial which if given would amount to conducting its trial through public media. The prosecution can only respond to any allegation of misdeed by remaining steadfast and continuing to conduct its trial with honesty and integrity to the best of its ability. It is then left to the judge to decide at the end of the trial based on the evaluation of all evidence.

[53] For those reasons this court finds that there is an immediate risk or threat of prejudice to the fair trial of the accused persons and the administration of justice. The risks that the prosecution will face in the conduct of the trial vis a vis the conduct of its witnesses and aspersions of malicious conduct by the prosecution cannot be compensated by any other remedy. An order to gag the respondent is therefore proportionate to the preservation of the right of the prosecution to conduct the trial without fear, undue pressure of public condemnation, suspicion of malicious misconduct or the risk of any of its witnesses becoming an absent, uncooperative or fearful witness. On equal footing it is also proportionate to the right of all the accused persons to a fair trial and the presumption of innocence until proven guilty.

[54] In coming to that conclusion this court is guided by what was held by the Federal Court in *Dato' Sri Mohd Najib bin Hj Abd Razak*. Richard Malanjum CJ speaking for the court stated:

> [30] The overarching theme here is that as far as is possible, court proceedings should be open and accessible to the public in the interests of transparency. Statutory support for the open justice concept is embodied in s 15(1) of the CJA which states that:
>
> > The place in which any Court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court to which the public generally may have access:
> >
> > Provided that the court shall have power to hear any cause or matter or any part thereof in camera if the court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason so to do.
>
> [31] Open justice is fundamental to a functioning democracy and promotes good governance. Cognizant of this, the English Court of Appeal in *Hodgson and Others v Imperial Tobacco Ltd* [1998]2 All ER 673 remarked at p 689 that:
>
> > *The best way of avoiding ill-informed comments in the media in the case of this nature when the interest of the public is high, is for the court to be as open as is possible and practicable,* not only in relation to the trial but also in relation to the interlocutory proceedings which have to take place prior to that trial. *The other action which can be taken to reduce the risk of trial by media and the absence of*

> *co-operation between the parties affecting the conduct of the proceedings is to ensure that as soon as is practical* a *timetable is laid down for bringing the case to trial as early as possible* and giving any directions to the parties which are necessary in order to require them to co-operate in achieving this. The longer the trial is delayed the greater the opportunity for both sides to engage in tactical manoeuvres which have nothing to do with achieving a fair trial. (Emphasis added.)

[32] Of course, no one is disputing here that open justice is not absolute. Under the common law, publication bans which are in substance similar to the relief being sought by the appellant are justifiable if there is a real and substantial risk of interference to the right to a fair trial. In *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835 the Canadian Supreme Court had occasion to examine the requirements to be fulfilled in a successful application for a publication ban:

> The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial bears the burden of justifying the limitation on freedom of expression. *He must prove that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by* a *reasonably available and effective alternative measure, that the proposed ban is as limited as possible, and that there is* a *proportionality between the salutary and deleterious effects of the ban.* The fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied. The judge should, where possible, review the publication ban at issue. He must consider all other options besides the ban and find that there is no reasonable and effective alternative available. He must also limit the ban as much as possible. Lastly, the judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate. (Emphasis added.)

[55] Guided also by the decision of the Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835 as quoted by the Federal Court above, this court does not propose to impose a broad gag-order as sought by the applicant. Such an order would be more than necessary and encroaches upon the Constitutional right of the respondent to express any factual and bona fide publication he wishes to make regarding the trial. A balance must be struck between the objective of the gag-order and the right of speech and expression of the respondent. The ban or gag order will also not restrict the right of the respondent to continue communicating with the police or the prosecution on any bona fide matter.

[56] The gag order will essentially restrict the respondent with regards to publications or comments that have the effect of casting allegations of speculation, suspicion or accusations of illegal conduct, cover up and

manipulation of evidence by the police, prosecution and the prosecution witnesses pending the final conclusion of the trial.

DECISION

[57] The application is thereby allowed subject to and in accordance with the following order:

> Bahawa Responden dan/atau ejennya yang mempunyai kaitan secara langsung dan/atau tidak langsung dengan Responden diperintah dan ditegah sementara menunggu pelupusan muktamad perbicaraan kes PA-458–1–02/2018 untuk tidak menerbitkan dan/atau menyebabkan penerbitan dalam media massa atau membuat siaran dan/atau apa jenis komunikasi dalam apa jua bentuk yang ditujukan kepada khalayak ramai dan/atau mana-mana pihak tertentu sebarang kata-kata, komen, perbincangan-perbincangan dan/atau kenyataan-kenyataan termasuk rujukan kepada sebarang komunikasi secara bertulis dan/atau tidak bertulis dengan pihak Pendakwaan dan/atau Polis DiRaja Malaysia yang mana kata-kata yang digunakan oleh Responden dan/atau ejennya secara langsung atau tidak langsung yang boleh membawa maksud atau kesan, sama ada disengajakan atau tidak dan/atau diniatkan atau tidak, bahawa perbicaraan kes PA-458–1–02/2018 dicemari oleh salah laku atau kecuaian atau kegagalan yang disengajakan oleh pihak Polis, Pendakwaan, saksi-saksi perbicaraan dan terkait dengan itu timbulnya spekulasi, tuduhan, tohmahan atau syak wasangka bahawa akan atau sedang berlaku satu perbuatan khianat, niat jahat, komplot atau salah laku untuk tidak melakukan siasatan, pendakwaan, penyampaian keterangan saksi dan pengendalian perbicaraan kes PA-45B-1–02/2018 secara benar, telus dan saksama mengikut kehendak undang-undang dalam pentadbiran keadilan. Kegagalan mematuhi Perintah akan menjadi satu penghinaan terhadap Mahkamah yang mulia ini.

PP's application allowed.

Reported by Ashok Kumar